



Submission by Catholics for Renewal to the

FREEDOM OF RELIGION REVIEW

1. Introduction and Summary

1.1 The following submission is lodged by ***Catholics for Renewal Inc.***, an organisation supported by many thousands of committed Australian Catholics who seek renewal of their Church to more closely reflect Christian teachings and values in its governance and leadership. Catholics for Renewal has a respected reputation amongst Australian Catholics particularly following its substantial evidence to the Victorian Parliamentary Inquiry into Child Sexual Abuse and the recent Royal Commission into Institutional Responses to Child Sexual Abuse. Catholics for Renewal's submissions were valued highly by the Royal Commission as reflected in the Commission's *Final Report*.

1.2 The Review Panel is required by its Terms of Reference to "consider the intersections between the enjoyment of the freedom of religion and other human rights." This brief goes to the essence of Church/State relations.

1.3 Catholics for Renewal has set out its position on a number of issues in the attached submission. As an overriding principle regarding "the intersections between the enjoyment of the freedom of religion and other human rights", Catholics for Renewal submits that **the essential challenge involved in this brief is to protect the human rights of all while respecting, to the extent reasonable, the particular human right of freedom of religion.**

1.4 **Catholics for Renewal believes that the State should not prevent Catholics or persons of other faiths or creeds from being able to freely practise their religion, as long as that practice does not unfairly prejudice the rights of others.** We accept that the State has a primary responsibility to protect the human rights of all its citizens. Therefore, the religious doctrines, beliefs and practices of any religion, including those of the Catholic Church, should not cause or permit unfair discrimination against other members of the broader society who do not share the same doctrines, beliefs and practices.

1.5 An extreme example necessarily requiring the State's intervention in restricting religious freedom, highlighted by the Royal Commission on Institutional Responses to Child Sexual Abuse, would be where the State would clearly be obliged to intervene should a religious institution endorse or permit any form of child sexual abuse. Another clear example would be any religious endorsement of violence against other members of society.

1.6 Catholics for Renewal submits that the above principle is in accord with the essence of the most basic Christian teachings. Nevertheless, we are aware that some leaders of our own faith may seek some religious protections that do not accord with the principle we

have stated. An example may be the treatment of people with different sexual preferences, as illustrated in the recent postal survey results about marriage equality.

1.7 In that regard, Catholics for Renewal would argue that the views of Christian, and indeed Catholic leaders, do not always reflect the views of their church members when expressed as Australian citizens. This view is evidenced by the high proportion of Christian citizens who showed support for marriage equality in the recent postal survey, despite a formal position put forward by many Christian leaders opposed to marriage equality.

1.8 Archbishop Dermot Martin of Ireland commented after the 2015 Irish referendum on marriage equality: “The Church needs a reality check right across the board, to look at the things we are doing well and look at the areas where we need to say, have we drifted away completely from young people? ... We have to stop and have a reality check, not move into denial of the realities.” Catholics for Renewal echoes this clarion call.

1.9 Catholics for Renewal would argue that **the Review Panel should have primary regard in its deliberations to the views of members of religions ‘as Australian citizens’, ahead of the doctrinal positions adopted by religious leaders.**

1.10 The Review Panel will know that the views of the Australian people on matters of human rights have matured considerably over the years, as witnessed by the recent postal survey on marriage equality. **Catholics for Renewal submits that the Review Panel will need to question whether existing exemptions from Commonwealth anti-discrimination legislation should be continued, let alone extended, given clearly changing societal values.**

1.11 Catholics for Renewal considers that the present authority, given to ministers of religion and religious marriage celebrants to solemnise marriages only in accord with their religious beliefs, is appropriate.

1.12 Catholics for Renewal questions the right of any religious institution to discriminate against its employees on the basis of religion, religious beliefs, marital status, or sexuality, unless the particular employment requires a knowledge or skill not held or practised by the employee. We would also question the right of any individual service provider in Australian society to refuse a service, generally available, to any individual on the basis of religion, beliefs, marital status or sexuality. Catholics have themselves suffered from that form of discrimination in the past, and have, to their shame, practised it against others as well.

1.12 Catholics for Renewal is not convinced that religious educators should be able to discriminate in good faith against teachers and other staff in Catholic schools or educational facilities, or even against prospective students, on the ground of their sexual orientation, gender identity, or marital status ‘in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’. Given the widespread support for marriage equality shown by Catholic citizens, those religious susceptibilities need to be questioned.

1.13 With the recent changes to the *Marriage Act*, Catholics for Renewal has concerns for LGBTIQ persons who solemnise their marriages under the *Marriage Amendment Act 2017* and currently work or wish to work in the Catholic Education sector. We are concerned that

discriminatory practices to reject such employees or place a discriminatory barrier to their application for employment would be an infringement of their human rights not warranted by the claimed arguments of religious freedom or ‘religious susceptibilities’. Such discrimination would effectively reject the clear societal acceptance of marriage equality reflected in the recent postal survey.

1.14 In regard to the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that Catholic priest confessors should not be exempted from a proposed requirement to report suspected child abusers when that information is obtained in the Catholic sacrament of Confession, Catholics for Renewal believes that the Church’s law in this area does not warrant exemption from a carefully considered legislative provision applying to society generally. We are concerned that the protection of religious freedom in this case could involve possible and probable further abuse of innocent children by predators remaining at large in society, despite knowledge of their existence by priest confessors of the Catholic Church.

1.15 As stated above, this **submission is based on the principle that the religious doctrines, beliefs and practices of any religion, including the Catholic Church, should be respected, but should not permit unfair discrimination against other members of society who do not share those doctrines, beliefs and practices.** The body of the submission addresses a number of issues in that regard and explains the context of relevant Catholic teaching.

1.16 Finally, Catholics for Renewal is of the view that **should the Review Panel be moved to recommend any extensions of religious protections, such recommendations should be open to public debate before implementation.** This is particularly important given the rushed nature of the Review Panel’s Inquiry and the fact that some of the submissions will be ‘confidential’ and not be published.

2. The Catholic Church and freedom of religion: an historical overview

2.1 Religious freedom has been at the centre of the Christian experience since the beginning of Jesus’ public ministry, when he was constantly harassed by religious zealots challenging him on his claim that he had “come to fulfil the Law or the Prophets, not to abolish them”.¹

2.2 Religious freedom was one of the first issues debated within the nascent Christian community. The Jewish Christians at Jerusalem were insisting that the gentiles/pagans (i.e. non-Jews) who Paul was baptising had to follow the Jewish Law and be circumcised. Paul disagreed and an intense debate erupted. The issue was resolved at the Council of Jerusalem with the decision not to impose on Gentile converts the Jewish laws relating to diet and ethnic purity.”²

¹ Mt. 5:17

² Acts 15:13-29

2.3 St Paul's vision of freedom and equality within the Christian community overthrew the Greco-Roman stratification of society based on ethnicity, class and gender, stating: "There is no longer Jew nor Greek, slave or free, male and female. You are all one in Christ."³

2.4 Central to Christianity's attractiveness was its insistence on the primacy of conscience, freedom of expression, free association and comprehensive social equality. These set it apart from all other religious traditions, and its moral principles and respect for legitimate authority - "Remind them to be subject to rulers, to authorities, to be obedient, to be ready for every good deed."⁴ - provided the authentic philosophical and moral foundations for all free, independent, liberal democratic societies.⁵

2.5 The early Christian community knew and experienced what it was like to be denied religious freedom. Without political power and viewed by the Roman authorities as a threat to the Empire and the *status quo*, it was subjected to sporadic persecutions from Nero (64 CE) to Constantine (306-337).

2.6 The Catholic Church's view on religious freedom has not always been consistent, especially when, from the time of Constantine I, it moved from being persecuted to being favoured. When Constantine I introduced his policy of universal toleration and religious freedom for both Christians and non-Christians in 306 CE, Christianity gained a privileged and favoured status within the Empire, accompanied by entitlements and exemptions, especially for Christian clerics. The purpose of the policy was "to grant both to the Christians and to all others full authority to follow whatever worship each person desired, whereby whatsoever Divinity dwells in heaven may be benevolent and propitious to us, and to all who are placed under our authority."⁶

2.7 Not long after Constantine's *Edict of Milan*, Emperor Theodosius issued the *Edict of Thessalonica* (380 CE), establishing Christianity as the state religion of the entire Roman Empire and virtually outlawing all others: "We authorize the followers of this law to assume the title of Catholic Christians; but as for the others, since, in our judgment they are foolish madmen, we decree that they shall be branded with the ignominious name of heretics, and shall not presume to give to their conventicles the name of churches."⁷

2.8 As the official religion of the Empire, Christianity began modelling its structures on those of its imperial patron and protector, becoming a hierarchical, authoritarian and less tolerant institution. This trend was reaffirmed and further entrenched by Emperor Charlemagne (800-814), and most particularly by Pope Gregory VII (1073-1085), whose 'Gregorian Reforms' claimed divine authority for ecclesiastical (canon) law, which was to be the dominant law for church and state and the supreme source of governance for the entire Holy Roman Empire. Rather than the Church being a purely spiritual authority, Gregory made it a legal institution with papal power as the basis for everything.

³ *Galatians* 3: 27-28

⁴ *Titus* 3:1

⁵ Sidetop, Larry, *Inventing the Individual. The Origins of Western Liberalism*, London: Penguin, 2014, pp. 1-47; 349-363

⁶ "313 The Edict of Milan" in *Christian History Institute Magazine*, originally published in *Christian History* Issue #28 in 1990] <https://christianhistoryinstitute.org/magazine/article/edict-of-milan/> ((Accessed 10/01/2018)

⁷ *Codex Theodosianus*, xvi.1. 2

https://www.revolvy.com/main/index.php?s=Edict%20of%20Thessalonica&item_type=topic) and (David Wright, 1967, p. xx). ((Accessed 10/01/2018)

2.9 The Catholic Church's intolerance of religious freedom was evident in its persecution of the Cathars in Southern France (12th-14th centuries) and even more so during the Spanish Inquisition (1478–1834), a judicial institution which used brutality and torture to stifle freedom of conscience and expression.

2.10 The Catholic Church's Counter Reformation intent was evident at the Council of Trent (1545-63), where each bishop present had to affirm: "I condemn, reject, and anathematize all things contrary to [the sacred canons and general councils] and all heresies that the Church has condemned, rejected and anathematized" and "I freely profess and genuinely hold this true Catholic faith without which no one can be saved" (*Profession of Faith*).

2.11 Over an extended period, the Catholic Church gradually became a closed theocratic system, self-authenticating and self-identifying, and claiming a higher moral order than the rest of human society. It felt no need to justify its claims to privileged status and entitlement. It judged this self-evident.

2.12 Pope Pius IX (1846-1878) roundly condemned the modern concepts of liberalism, moral relativism, secularization and separation of church and state, and had fixed ideas on religious freedom. His 1864 encyclical *Syllabus of Errors* declared a series of 80 propositions including the following as 'erroneous':

- "The Church is not a true and perfect society, entirely free- nor is she endowed with proper and perpetual rights of her own, conferred upon her by her Divine Founder; but it appertains to the civil power to define what are the rights of the Church, and the limits within which she may exercise those rights" (Proposition 19)
- "Besides the power inherent in the episcopate, other temporal power has been attributed to it by the civil authority granted either explicitly or tacitly, which on that account is revocable by the civil authority whenever it thinks fit" (Proposition 25)
- "The immunity of the Church and of ecclesiastical persons derived its origin from civil law" (Proposition 30).

2.13 Pope Leo XIII (1878-1903) expressed his discomfort with thinking Catholics, especially citizens in liberal democracies, questioning and analysing doctrinal matters in terms of their political and cultural democratic experience, stating:

"...there is a greater danger and a more manifest opposition to Catholic doctrine and discipline in that opinion of the lovers of novelty, according to which they hold such liberty should be allowed in the Church, that her supervision and watchfulness being in some sense lessened, allowance be granted the faithful, each one to follow out more freely the leading of his own mind and the trend of his own proper activity. They are of opinion that such liberty has its counterpart in the newly given civil freedom which is now the right and the foundation of almost every secular state. ...[We have already] set forth the difference existing between the Church, which is a divine society, and all other social human organizations which depend simply on free will and choice of men."⁸

⁸ Leo XIII, *Testem benevolentiae nostrae*. Concerning New Opinions, Virtue, Nature and Grace, With Regard to Americanism – 1899. <http://www.papalencyclicals.net/Leo13/113teste.htm>. (Accessed 09/01/2018)

2.14 Once an integral part of the power structure of the West, during the 20th century the Catholic Church, in the face of a modern world becoming more secular, consumerist, inequitable and less ethical, began to lose its power and moral sway over both peoples and nations.

2.15 Whereas Pius IX held that democracy was a deviation from truth and the proper established order, Leo XIII was less absolutist, but extremely cautious, and argued that the Church itself was responsible for the idea of the separation of Church and State as well as its justification:

“With the Church originated a great fact, the separation of spiritual and temporal power. This separation is the source of liberty of conscience; it is founded on no other principles but that which is the foundation of the most perfect and extended freedom of conscience. The separation of temporal and spiritual power is based upon the idea that physical force has neither right nor influence over souls, over conviction, over truth. It flows from the distinction established between the world of thought and the world of action, between the world of internal and that of external facts. Thus this principle for which Europe has struggled so much, and suffered so much, the principle which prevailed so late, and often, in its progress, against the inclination of the clergy, was enunciated under the name of the separation of temporal and spiritual power, over the very cradle of European civilization.”⁹

2.16 Historically the Catholic Church has been willing to work with any form of government, so long as the rights of God and of Christian conscience are protected. Since the 11th century the Holy See has also signed ‘concordats’ – a type of convention - with various sovereign states defining the particular relationship between the Church and the state in relation to recognition of certain church privileges and certain secular matters that impact on church interests. They proliferated after World War I and, even after Vatican II, have continued. They have been criticized for giving the Church privileges which other religious groups are denied: they are not the same as ‘treaties’ for the Church negotiates them as both a religious and political entity; and their effect, giving the Church a pre-eminent status, can marginalize other religious groups.

2.17 Some concordats gave civil authorities certain rights and privileges in the selection, nomination, and appointment of Catholic bishops. Vatican II, however, in order to protect the freedom of the Church, abrogated these arrangements and asked all civil authorities to surrender them.¹⁰

3. Catholic Church, United Nations and Religious Freedom

3.1 After World War II, the United Nations Organization was established, and one of its first actions in 1948 was to draw up *Universal Declaration of Human Rights (UDHR)*. Its Preamble states: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in

⁹ Guizot, François, *History of Civilization in Europe*, London: Harmondsworth, 1997, 42, quoted in Sidentop, Larry, *Inventing the Individual. The Origins of Western Liberalism*. London: Penguin, 2014, p.133.

¹⁰ *Christus Dominus*, n. 20

barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . . ”¹¹

3.2 From the outset, the Holy See has had a special bond of cooperation with the United Nations through a Permanent Observer. The existence of the bond rests on the sovereignty with which the Holy See has been endowed, and warranted by the need of the papacy to exercise its mission in full freedom, and to be able to deal with any interlocutor, whether a government or an international organization, without dependence on other sovereignties. The nature and aims of the spiritual mission of the Holy See and the Church make their participation in the tasks and activities of the United Nations Organisation very different from that of the States, which are communities in the political and temporal sense.

3.3 Among the *UDHR*'s 30 Articles, those pertaining to religious freedom state:

“Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

3.4 Pope John Paul II, in his 1979 address to the 34th UN General Assembly, said of the *UN Declaration of Human Rights*:

“This document is a milestone on the long and difficult path of the human race. The progress of humanity must be measured not only by *the progress of science and technology*, which shows man's uniqueness with regard to nature, but also and chiefly by *the primacy given to spiritual values* and by *the progress of moral life*. In this field is manifested the full dominion of reason, through truth, in the behaviour of the individual and of society, and also the control of reason over nature; and thus human conscience quietly triumphs.”¹¹

3.5 The 1948 *Universal Declaration of Human Rights* (UDHR) declares that “childhood is entitled to special care and assistance” (Article 25 (2)).¹² Pope John Paul II described the UDHR as one of the most valuable and significant documents in the history of law’, and the Holy See has stated that it finds a “great convergence between the Declaration and Christian anthropology” and that the Declaration founds human rights on the notion of human dignity.¹³ The 1959 *UN Convention on the Rights of the Child* further extended the UDHR by spelling out its principles in relation to the value and human dignity of children.¹⁴

¹¹ https://w2.vatican.va/content/john-paul-ii/en/speeches/1979/october/documents/hf_jp-ii_spe_19791002_general-assembly-ONU.html (Accessed 7/2/2108)

¹² *UN Declaration of Human Rights*. Full text readable at <http://www.un.org/en/universal-declaration-human-rights/> (Accessed 20 November 2015)

¹³ Cf. Adolphe, Jane, ‘The Holy See and the Universal Declaration of Human Rights: Working toward a Legal Anthropology of Human Rights and the Family’, in *Ave Maria Law Review*, Ann Arbor, Michigan, Vol. 4.2, 2006, pp. 344-345 . Text readable online at <http://lr.avemarialaw.edu/Content/articles/V4i2.adolphe.copyright1.pdf> (Accessed 20 November 2015)

¹⁴ *UN Convention on the Rights of the Child*. Full text readable at <http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> (Accessed 20 November 2015)

3.6 The Holy See became a signatory to the core UN international human rights treaty, the *UN Convention on the Rights of the Child* (CRC)¹⁵ in 1990 and ratified it the same year.¹⁶ However, the Holy See has always argued that this treaty can only be applied in line with Catholic Church teaching. Among the 42 articles of the CRC are the following:

“Governments should ensure that children are properly cared for, and protected from violence, abuse and neglect by their parents, or anyone else who looks after them’ (Art. 19);
Governments should protect children from sexual abuse’ (Art. 34);
Children should be protected from any activities that could harm their development’ (Art. 36); and
Children who have been neglected or abused should receive special help to restore their self-respect” (Art. 39).

3.7 In 2014 the UN Committee of the Rights of the Child, which administers the CRC, severely criticised the Vatican's handling of abuse cases and what it saw as its failure to comply with the Convention. It rejected the Vatican’s contention that it had no jurisdiction over its bishops and priests around the world and was only responsible for putting the CRC into effect within the Vatican City State confines. The Committee argued that in ratifying the Convention the Holy See had taken responsibility for ensuring the CRC was respected by all individuals and institutions under the Holy See’s authority around the world. In reply, the Holy See contended that the Vatican and the Holy See were different from the universal Catholic Church.¹⁷

3.8 The Catholic Church certainly recognises human rights, but only those which it considers ‘legitimate’. The *Catechism of the Catholic Church* includes a long list of them (cf. ‘rights’ in CCC Index). Cardinal Joseph Ratzinger (later Pope Benedict XVI) stated in 1990: “The freedom of the act of faith cannot justify a right to dissent. Respect for religious liberty is the foundation of respect for all the rights of man. One cannot then appeal to these rights of man in order to oppose the interventions of the Magisterium”.¹⁸ Therefore, the Catholic Church will only recognise human rights which are compatible with Catholic doctrine, and these it calls ‘*authentic*’ or ‘*legitimate*’ human rights. This narrow doctrinaire reinterpretation

¹⁵ In 2004, the UN General Assembly confirmed the Vatican's status as a Permanent Observer. Currently, the Holy See has the right to participate in the general debate of the General Assembly and to intervene in the discussion of any issue inscribed in the agenda of that assembly. It has the right to participate in all meetings open to all Member States, the right to make points of order and to exercise the right of reply, the right to circulate proposals and position papers as official documents, and the right to co-sponsor draft resolutions and decisions. It has never applied for membership.

¹⁶ *UN Convention on the Rights of the Child*. Text of the Convention readable at <http://www.unicef.org.au/Upload/UNICEF/Media/Our%20work/childfriendlycrc.pdf> (accessed 20 November 2015)

¹⁷ Cf. Laurie Goodstein, Nick Cumming-Brice and Jim Yardley, “U.N. Panel Criticizes the Vatican Over Sexual Abuse”, *New York Times*, 5 February 2014. <http://www.nytimes.com/2014/02/06/world/europe/un-panel-assails-vatican-over-sex-abuse-by-priests.html> and “Holy See's Comments to Observations From UN Committee on Rights of the Child”, *Zenit*, 26 September 2014. <http://www.zenit.org/en/articles/holy-see-s-comments-to-observations-from-un-committee-on-rights-of-the-child> (Accessed 9/2/2018)

¹⁸ Joseph Cardinal Ratzinger, Prefect, Congregation for the Doctrine of the Faith, Instruction: *Donum veritatis*, On the Ecclesial Vocation of the Theologian, 24 March 1990, n.36. Text readable at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_en.htm (accessed 20 November 2015)

of human rights is a regression from the charter of Christian adulthood and freedom conscience spelt out by the Apostle Paul (*1 Cor.* 8-10; *Gal.* 3:23-4:8).

4. Second Vatican Ecumenical Council and Religious Freedom

4.1 From 1962 to 1965 the 2nd Vatican Ecumenical Council, the highest teaching authority of the Catholic Church, met and formulated a series of authoritative documents which were approved and signed by the Bishop of Rome. Several contain foundational statements relating to religious freedom, discrimination and the relations between church and state.

4.2 In its *Constitution on the Church in the Modern World (Gaudium et Spes)* the Council states:

“It is highly important, especially in pluralistic societies, that a proper view exist of the relation between the political community and the Church. Thus the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with their shepherds. The role and competence of the Church being what it is, she must in no way be confused with the political community, nor bound to any political system. In their proper spheres, the political community and the Church are mutually independent and self-governing. Yet, by a different title, each serves the personal and social vocation of the same human beings. This service can be more effectively rendered for the good of all, if each works better for wholesome mutual cooperation, depending on the circumstances of time and place.”¹⁹

4.3 In its Declaration on *Religious Freedom (Dignitatis humanae)*, the Council states:

“This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.”²⁰

4.4 In its *Pastoral Constitution on the Church in the Modern World*, the Council further states:

“Since all men ... have the same nature and origin ... and enjoy the same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. True, all men are not alike from the point of view of varying physical power and diversity of intellectual and moral resources. Nevertheless, with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, colour, social condition, language, or religion, is to be overcome and eradicated as contrary to God’s intent. For in truth it

¹⁹ *Pastoral Constitution on the Church in the Modern World (Gaudium et spes)*, n. 76

²⁰ *Declaration on Religious Freedom (Dignitatis humanae)*, n. 2

must still be regretted that fundamental personal rights are not yet being universally honored.”²¹

4.5 In its *Declaration on the Relationship of the Church to Non-Christian Religions (Nostrae aetate)* the Council states:

“The Church has this exhortation for her sons: prudently and lovingly, through dialogue and collaboration with the followers of other religions, and in witness of Christian faith and life, acknowledge, preserve and promote the spiritual and moral goods found among these men, as well as the values in their society and culture (n.2). The Church repudiates all persecutions against any man (n.4). The ground is therefore removed from every theory or practice which leads to a distinction between men or peoples in the matter of human dignity and the rights which flow from it (n.5).”²²

4.6 Catholics for Renewal urges the Review Panel to give full consideration to these foundational statements of the 2nd Vatican Council when formulating its recommendations on religious freedom in Australia.

4.7 Following Vatican II, Pope Paul VI determined to build on its initiatives by drawing up a document titled the *Fundamental Law of the Church*, a virtual Catholic Bill of Rights. It was to serve as both a moral reference point and guide for the Catholic Church, and as a point of intersection with the highest ethical principles of modern secular democratic society. It was never completed, but survives in a distilled form in the 1971 Synod of Bishops decree, *The Performance of Justice: The Testimony of the Church*.²³

4.8 The Catholic Church is currently coming to grips with new challenges to human rights and religious freedom. Two of the most urgent are the rights of the child and the right to marriage equality. Both are being played out dramatically in Australia and globally. Both are integrally linked with religious freedom. As these challenges become clearer, a growing tension is emerging within the Catholic Church. Pope Francis is seeking to bring about a major shift in Catholic thinking, away from a mindset that expects and presumes both entitlement and special status. Robert Mickens explains:

“The Church of Rome has fought mightily for more than a millennium and half to protect specific prerogatives, privileges and powers that it accrued, not through any divine mandate or in fulfilment of the Scriptures, but through the benevolence and political calculations of worldly rulers. Most specifically, it has clung to the early post-Constantinian paradigm of Christianity and the monarchical structure and protocols it adopted from the collapsed Roman Empire. Working towards a full-scale 'paradigm shift' Pope Francis has not just unleashed the stifled energies of Vatican II, he is actually leading the effort to help the church enter into the new paradigm”²⁴

²¹ *Gaudium et spes*, n. 29

²² *Nostrae aetate*, nn. 2, 4, 5

²³ “The Performance of Justice”, The World Synod of Bishops, 1971, <https://www1.villanova.edu/content/dam/villanova/mission/JusticeInTheWorld1971.pdf>) (Accessed 08/01/2018)

²⁴ *La Croix International*, January 12, 2018. https://international.la-croix.com/news/working-towards-a-full-scale-paradigm-shift/6713?utm_source=Newsletter&utm_medium=e-mail&utm_content=12-01-2018&utm_campaign=newsletter_cr_x_lci&PMID=47765922ca935ed104281ce03e24b04a (Accessed 13/01/2018)

5. Australian Constitution

5.1 The *Commonwealth of Australia Constitution Act 1900* (s. 116) states:
“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth”.

Catholics for Renewal would not want to see any change made to s.116 of the Constitution.

5.2 In the later part of the 20th century, the Commonwealth Government introduced several pieces of anti-discrimination legislation: the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*; and the *Age Discrimination Act 2004*. Under these Acts it is unlawful in Australia to discriminate against any person on the basis of certain attributes including race, sex, intersex status, gender identity and sexual orientation in certain areas of public life, including education and employment.

5.3 The Australian Government also has *Guidelines on the Recognition of Sex and Gender* outlining a consistent gender classification system and standard of evidence. States and territories within the Commonwealth also have their own anti-discrimination legislation.

5.4 Australia is a party to seven core international human rights treaties. By ratifying these treaties, Australia has voluntarily accepted legal obligations under international law, and its own legislation must be scrutinized and reported in relation to its obligations. Australia is also an active participant in the *Universal Periodic Review* process allowing an in-depth analysis of Australia's compliance with its obligations.²⁵

6. The Catholic Church and Marriage

6.1 The 1997 *Catechism of the Catholic Church* (CCC) states: “Marriage is a covenant or partnership for the whole of life between a man and woman, which by its nature is ordered to the good of the spouses and to the procreation and upbringing of offspring. When validly contracted between two baptized people, marriage is a sacrament.”²⁶

6.2 In the Latin Rite of the Catholic Church, the celebration of marriage between two Catholics normally takes place during the Eucharistic celebration. As the liturgical celebration of marriage must be, *per se*, valid, worthy and fruitful, according to the Latin tradition, the spouses, as ministers of Christ's grace, mutually bestow upon each other the sacrament of Matrimony by expressing their consent before the Church. In the traditions of the Eastern Church, the priests are witness to the mutual consent given by the spouses, but for the validity of the sacrament their blessing is also necessary.²⁷

²⁵ Legislation: Australian Human Rights Commission (Accessed 12/01/2018) <https://www.humanrights.gov.au/our-work/legal/legislation>) See also other relevant human rights protections in Australian law.

²⁶ *Catechism of the Catholic Church*, Libreria Editrice Vaticana, 1967, n. 1601

²⁷ *Ibid.*, nn. 1621, 1623

6.3 The Church normally requires that the Catholic faithful contract marriage according to the ecclesiastical form (the ‘rites’) of the Catholic Church, because: (a) sacramental marriage is a liturgical act; (b) marriage introduces a person into an ecclesial order and creates rights and duties; (c) marriage is a state of life and requires certainty (hence witnesses); and (d) marriage has a public character which helps the spouses to remain faithful.²⁸

6.4 A marriage between a Catholic and a baptized non-Catholic is described by the Catholic Church as a ‘mixed’ marriage. Under the current canon law (CIC) of the Latin Church (C. 1124) a mixed marriage requires the ‘express permission’ of ecclesiastical authority for lawfulness. This permission presupposes that both parties know and do not exclude the essential ends and properties of marriage, and that the Catholic party confirms the obligations, which have been made known to the non-Catholic party, of preserving his or her own faith and ensuring the baptism and education of the children in the Catholic Church (C. 1125). The Catholic Church does not look favourably on mixed marriages, and does not underestimate the difficulties which are to be encountered, but it does not consider the difference of religious confession as an insurmountable obstacle.

6.5 A marriage between a Catholic and a non-baptized person is described by the Catholic Church as a marriage with ‘disparity of cult’. The Catholic Church looks even less favourably on this marriage and sees greater difficulty for the Catholic party and the marriage itself. For the validity of such a marriage, an ‘express dispensation’ from the impediment must be obtained from the ecclesiastical authority, and will only be given on the same conditions as for a mixed marriage.²⁹

6.6 For the Catholic Church, ‘homosexuality’ refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. Catholic tradition has declared that “homosexual acts are intrinsically disordered”, are contrary to the natural law, and under no circumstances can they be approved. The Church accepts that many persons have ‘deep-seated homosexual tendencies’, but teaches that this inclination is ‘objectively disordered’ and constitutes for most ‘a trial’. It also teaches that such persons must be accepted with respect, compassion, and sensitivity, and that “every sign of unjust discrimination in their regard should be avoided. Further, it teaches that “homosexual persons are called to chastity.”³⁰

6.7 In its Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Marriage Equality Amendment Bill 2010* in April 2012, the Australian Catholic Bishops Conference (ACBC) stated:

“The Church makes this submission to support continuing to define marriage as the exclusive and permanent union of a woman and a man. It strongly opposes changing the definition to include same sex marriages. Gay people should be treated with respect and compassion, but that is not the same as allowing the institution of marriage to be changed. Changing the meaning of marriage to something which it is not discriminates against all those who have entered into marriages and are faithful to that commitment, whether for one, ten, thirty or fifty years. The Church recognises that people of the same sex can have deep and loving friendships, but the

²⁸ *Ibid.* n. 1631

²⁹ *Ibid.* nn. 1634-1635

³⁰ *Ibid.* nn. 2357-2359

Church strongly holds that these friendships cannot lead to marriage because of the particular nature and role of marriage. The reason governments have an interest in marriage is because it is a union that might produce children. Governments promote stable marriages because they are important to the welfare of children and because marriages and families are key to the future of the community. Families are small communities in themselves on which the wider community is built and they are the main place in which children are socialised to take their place in the wider community. The Church recognises that women and men are equal in dignity but different, not only in their physical attributes but also spiritually and psychologically. Though different, there is a complementarity between men and women that allows a sexual union. Not all genital acts between a woman and a man are procreative but all imply the possibility of procreation. While a same sex couple might have a genuinely loving relationship, the ability of marriage between a man and a woman to lead naturally to children, prompting the state's interest in the welfare of children resulting from those unions, cannot be found in same sex marriages. The Church agrees there should not be unjust discrimination against same sex attracted people. But it is not unjust to point out the special nature of marriage, that same sex marriages would be quite different and to argue that given the two relationships are quite different, they therefore should not be called the same thing. It is important that children have access to both a mother and a father, and while many families struggle to do their very best with a single parent, governments should not decide as a matter of policy that this should be a new norm” (Summary).³¹

6.8 The recent debate about changes to the Commonwealth *Marriage Act 1961*, in the lead-up to the postal survey on same-sex marriage was essentially about ‘marriage equality’, not ‘same-sex marriage’ or the Catholic Church’s traditional teaching on matrimony. Marriage equality in Australia is a matter of state or civil law. The ‘sacramentality’ of Matrimony is the domain of the Catholic Church (and some other churches). These competencies and jurisdictions are not the same. In Australia, the Catholic Church and other religious groups are and should be free to hold and publicly express their views about what they understand marriage to be and to represent. They are and should be free to publicly express their views on what they perceive to be the rightness or wrongness of State law and, if they feel it necessary, to advocate change. In fact, a coalition of Australian religious leaders, including Archbishop Fisher of Sydney, did this in a 2015 letter to then Prime Minister Tony Abbott, stating:

"As leaders of Australia's major religions we write to express the grave concerns that we, and those who share our various faiths, share regarding Bills that have or will be introduced into the Federal Parliament to change the definition of marriage in Australian law. The definition of marriage enshrined in the Commonwealth *Marriage Act 1961* – ‘the union of a man and a woman, to the exclusion of all others, voluntarily entered into for life’ - reflects a truth deeply embedded across diverse communities, faiths and cultures. While suffering and injustice faced by

³¹ <https://www.catholic.org.au/acbc-media/downloads/public-policy/1302-acbc-submission-marriage-equality-and-marriage-bills-march-2012-1/file> (Accessed 10/2/2018)

people with same-sex attraction was to be ‘deplored’, this does not require the further deconstruction of marriage as traditionally understood.”³²

6.9 However, where religious leaders claim that their religious liberty or other human rights are under attack, the onus must be upon them to demonstrate the validity of their claim.

6.10 The Australian Catholic Bishops Conference (ACBC) issued a statement titled ‘Don’t Mess with Marriage’ and several individual Catholic bishops released their own statements. All used the language of ‘same-sex marriage’ and criticized its discontinuity from ancient religious traditions and cultures of heterosexual marriage and procreation.³³

7. Commonwealth Marriage Amendment (Definitions and Religious Freedoms) Act 2017

7.1 The *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* has as its objectives to create a legal framework:

- (a) to allow civil celebrants to solemnise marriage, understood as the union of 2 people to the exclusion of all others, voluntarily entered into for life; and
- (b) to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious beliefs; and
- (c) to allow equal access to marriage while protecting religious freedom in relation to marriage (s. 2A).³⁴

7.2 The *Act* defines marriage as “the union of 2 people to the exclusion of all others, voluntarily entered into for life.” Therefore, two persons of the same sex may now marry under Australian law.

7.3 The 2017 Act also includes a special provision (s.2, ss.5 (1)) which repeals the previous definition of ‘authorized celebrant’ and substitutes a definition which includes a new category of authorized celebrant termed a ‘religious marriage celebrant’. In the Act a “*religious marriage celebrant*” means a person identified as a religious marriage celebrant on the register of marriage celebrants under Subdivision D of Division 1 of Part IV. Under this provision registered authorized celebrants who have a conscientious objection to acting as an authorized celebrant in a civil marriage of persons of the same sex, may choose to reregister with the Commonwealth as a religious marriage celebrant before 9 March 2018. The application must be based on religious beliefs. Ministers of religion are

³² “Australian Religious Leaders Call on PM And Parliament to Uphold True Meaning of Marriage,” *Catholic Communications, Sydney Archdiocese, 9 Jun 2015* (Accessed 10/01/2018)

³³ ACBC, “Don’t Mess With Marriage” - a Pastoral Letter from Australia’s Catholic Bishops. *Catholic Communications, Sydney Archdiocese, 28 May 2015* (Accessed 12/01/2018) https://www.sydneycatholic.org/news/latest_news/2015/2015528_1872.shtml
<http://melbournecatholic.org.au/Melbourne-News/archbishop-hart-releases-pastoral-letter-on-same-sex-marriage>
Archbishop of Hobart Defends Church’s Position on Marriage Against Charges of Discrimination by Same-Sex Lobbyists, *Catholic Communications, Sydney Archdiocese, 8 Jul 2015* (Accessed 12/01/2018) http://www.sydneycatholic.org/news/latest_news/2015/201579_1102.shtml
Catholic Media Office, “Archbishop Hart releases pastoral letter on same-sex marriage,” Thursday 24 August 2017 (Accessed 11/01/2018) www.melbournecatholic.org.au

³⁴ <https://www.legislation.gov.au/Details/C2017A00129> (Accessed 10/2/2108)

entitled to be registered as a religious marriage celebrant (s. 8, 39DA).

7.4 Authorized celebrants who are religious marriage celebrants are entitled to be, and must be, identified on the register of marriage celebrants as such (s. 8, 39DC).

7.5 If the authorized celebrant is registered as a religious marriage celebrant, all documentation (including advertisements) which relates to the performance of services as a marriage celebrant must also disclose that the celebrant is a religious marriage celebrant (s. 9).

7.6 Under the *Act* a ‘minister of religion’ may refuse to solemnise a marriage if any of the following applies:

- (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister’s religious body or religious organisation;
- (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
- (c) the minister’s religious beliefs do not allow the minister to solemnise the marriage.

This section does not limit the grounds on which a minister of religion may refuse to solemnise a marriage (s. 20).

7.7 Under the *Act* a ‘religious marriage celebrant’ may refuse to solemnise a marriage if the celebrant’s religious beliefs do not allow the celebrant to solemnise the marriage. This section does not limit the grounds on which a religious marriage celebrant may refuse to solemnise a marriage (s. 21).

7.8 Under the *Act* a ‘body established for religious purposes’ may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body; or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This applies to facilities made available, and goods and services provided, whether for payment or not. It does not limit the grounds on which a body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage (s.21).

7.9 Catholic ministers of religion registered as authorized marriage celebrants may solemnise a civil marriage only “according to the rites of the Catholic Church”. As the rites of the Catholic Church do not permit a marriage between persons of the same sex, Catholics for Renewal does not consider the amended definition of marriage to present any interference with the Catholic Church’s freedom of religion in this regard.

7.10 Catholics for Renewal does not consider that the civil and religious liberties of the Catholic Church and other religious groups were violated by the recent amendments to the Commonwealth *Marriage Act 1961*.

7.11 Should the Catholic Church authorities wish to do so, they could decide to have none of their religious ministers registered as authorized marriage celebrants under the Commonwealth *Marriage Act*. In this case, all marriages of Catholic persons would first be solemnised as purely civil marriages before a registered marriage celebrant, outside a liturgical setting, and then, if the Catholic parties so wished, they could then follow up the civil marriage with a religious or liturgical marriage ceremony to signify and formalize its sacramental nature. This is the practice followed in some European countries and is generally accepted by the Catholic Church.³⁵ Catholics for Renewal would not be opposed to such a decision by the Catholic Church authorities in Australia.

7.12 Catholics for Renewal does have some concern with the term ‘religious marriage celebrant’. It is possible, even likely, that those registered as such, who are not ministers of religion, may be confused with ministers of religion and as representing a religious body. This could have undesirable consequences for the celebrant, as some persons want to solemnize their marriage without any religious content whatsoever. One suggestion is that the term be changed to ‘traditional marriage celebrant’.

7.13 In the lead-up to the parliamentary debate on marriage equality, some religious opponents of marriage equality claimed same-sex marriage would have far-reaching negative consequences for gender education and claimed it would harm religious freedom and freedom of speech. Catholics for Renewal is satisfied that the leadership of the Catholic Church in Australia has no need for concern about possible negative impacts of the changes to the *Marriage Act* on the integrity of the Catholic education system. The leadership and teaching staff in Catholic schools are adequately educated and equipped to accommodate, deal with, and address the many different, even conflicting pluralities of issues and views that surface in both the secular and religious curricula. Student-centred teaching strategies are standard practice in Catholic schools. A teacher’s pedagogical starting point is to find out what exactly students know about the subject area in order to teach lessons that are relevant to the students’ own knowledge and experience.

7.14 The widely used ‘Catholic Identity Project’ recognises that students live in a multi-faith world and that in schools today many of the families who want a Catholic education are not part of an active Catholic community. In any class there would be students whose families live within a variety of situations from traditional, single parent, same sex partners, or sometimes with grandparents as carers. In any unit of the curriculum the teacher starts by finding out the students' knowledge and experience around a topic. This is what student-centred teaching is about, rather than a content-driven curriculum.³⁶ Therefore, when teaching the topic of marriage to senior students, the lesson would start with why has marriage been part of most societies over time, in what ways has the structure of marriage developed, why do people today want to, or not want to, get married. Same sex marriage would probably be brought up in these discussions. The role of the religious education teacher in a Catholic school is to show the students the history and development of marriage within the Catholic tradition and the importance it holds to the openness of the couple to procreation. The Church teaching about marriage would then be discussed along with the concept of sacrament

³⁵ <https://www.ncronline.org/news/world/european-countries-distinguish-between-religious-civil-marriages> (Accessed 11/2/2018)

³⁶ Helen Gregory, “Hunter Catholic school principal discourages teachers from publicly supporting same sex marriage,” *The Newcastle Herald*, August 31, 2017 (Accessed 10/01/2018) <http://www.theherald.com.au/story/4891538/hunter-catholic-school-principal-discourages-teachers-from-publicly-supporting-same-sex-marriage/>

and sacramentality. The process is about education, not indoctrination. These should not be confused.

8. Marriage Amendment Act 2017 and discrimination in employment

8.1 The Commonwealth has two pieces of legislation, the *Sex Discrimination Act 1984* (SDA) and the *Age Discrimination Act 2004* (ADA), which both contain exemptions for religious bodies as well as a general exemption for any acts or practices that conform to the doctrines, tenets or beliefs of the relevant religion, or are necessary to avoid injury to the religious sensitivities of adherents of that religion (ADA s.35 and SDA para 37 (d)). The SDA refers to 'religious susceptibilities'. The ADA and SDA provisions both apply to a religious body which is 'a body established for religious purposes'. The exemptions apply in relation to all of the grounds of discrimination covered by the Acts, which, under the SDA, includes sex, marital status, pregnancy, potential pregnancy and family responsibilities. The SDA religious exemption also covers several other specific activities.

8.2 The SDA contains specific exemptions for educational institutions established for religious purposes (s. 38) in relation to the employment of staff and the provision of education and training. Specifically, s.38 provides exemptions for:

- discrimination on the grounds of sex, marital status or pregnancy in the employment of members of staff or contract workers (ss. 38(1) and (2)), and
- discrimination on the grounds of marital status or pregnancy in connection with the provision of education or training (s. 38(3)).

In order to rely on s.38, the discrimination must be in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'. S.38 only applies in relation to 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', where 'educational institution' is defined as a school, college, university or other institution at which education or training is provided (s. 4).

8.3 In the *Australian Human Rights Commission (AHRC) Act*, the term 'discrimination' (except in Part IIB) means:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or

preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed (s.3).

8.4 There are exemptions to discrimination under the *Fair Work Act 2009* (FWA) for any action taken against a staff member of a religious institution, where the action is taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed (ss.153(2), 195(2) and 351(2)). A religious institution includes ‘an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’.

8.5 The religious exemptions under the SDA expressly cover a number of specific activities, as well as a ‘catch-all’ provision covering any acts or practices that conform to the doctrines, tenets or beliefs of the relevant religion. The SDA expressly covers religious educational institutions, whereas the ADA and FWA refer to ‘a body established for religious purposes’ (ADA) and ‘an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’ (FWA). The qualifier to the religious purpose test under the religious educational institution exemptions in the SDA and the exemption in the FWA differs from that under the ADA and SDA general religious bodies exemptions. The former provisions require the act to have been done ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of the religion’, whereas the latter provisions refer to the act being ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’.

8.6 A number of issues were raised regarding the religious exemptions in the SDA during the Senate Committee inquiry into the effectiveness of the SDA in 2008. These included:

- exemptions applied ‘automatically’ for religious organisations that do not require any justification by the religious organisation for why the exemption should apply. Nor is there any requirement for religious bodies to demonstrate how they are promoting equality of women and men as far as is possible within the parameters of their doctrines, tenets or beliefs. It was suggested that the permanent exemptions be removed, but that some sort of process should be retained for balancing the right to freedom of religion with the right not to be discriminated against.
- the exemption in s.38 (SDA) for religious educational institutions, particularly on the basis that these institutions are the recipients of public funding and that people should not be required to forgo their ordinary human rights when they commence employment in religious schools. The Australian Law Reform Commission (ALRC) recommended removal of this exemption in its *Equality Before the Law* report.
- the phrase in ss.37(d) and s.38 (SDA) ‘to avoid injury to the religious susceptibilities of adherents of that religion’ is too broad because it may permit discrimination on the basis that an act will injure the religious susceptibilities of some adherents of a religion.
- s.38 should not include discrimination on the grounds of pregnancy or sex. It is the marital status of employees and potential employees which is of concern to Christian schools.
- s.38 should require that the discrimination be reasonable in the circumstances as well as ‘in good faith’, as the concept of ‘good faith’ is subjective, too wide ranging and departs from the way other provisions of the Act apply.

- s.38 should relate only to an employee’s conduct during a selection process, in the course of their work or in doing something connected with their employment, and should not interfere with employees’ private lives.

8.7 In its report, the Senate Committee on Legal and Constitutional Affairs recommended that further consideration be given to reviewing the operation of s.38 of the SDA, to:

- retain the exemption in relation to discrimination on the basis of marital status; and
- require a test of reasonableness.

8.8 The ALRC recommended removal of the exemption in s.38. However, if the exemption was to be retained, the ALRC recommended that, at the very least, the exemption for discrimination on the ground of ‘marital status’ should be amended to require a test of reasonableness. The ALRC’s view was that “religious freedom and the right to enjoy culture and religion must be balanced with the right to equality and with the principle of non-discrimination. The statutory exemption prefers one right over another and precludes any consideration of where the balance between the rights should be.”

8.9 The Human Rights and Equal Opportunity Commission (HREOC) considered the religious institutions exemption in its *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation - Discrimination on the ground of sexual preference* (HRC Report No 6, March 1998). The inquiry involved a complaint of discrimination in employment based on sexual preference under the *Human Rights and Equal Opportunity Commission Act 1986*. The Commission considered that the requirement that the distinction be made ‘in good faith’ requires a subjective test. However, it is not sufficient that the relevant distinction is made in good faith – the distinction must also be made ‘in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’. The Commission considered that this latter element of the provision introduced an objective element.³⁷

8.10 A recent report prepared for the Australian Catholic Council for Employment Relations (ACCER), *Our Work Matters: Catholic Church employers and employees in Australia*, and published by the Pastoral Research Office of the Australian Catholic Bishops Conference,³⁸ found that the Catholic Church in Australia has a total full-time/part-time/casual workforce of 219,771 persons, of whom 45,022 are male, 153,472 female, and 21,277 with no sex recorded.

8.11 Of all employees, a total of 99,370 work in the Catholic Education sector: 46,771 full-time, 37,330 part-time, and 15,269 casual. This sector has the highest percentage of full-time employees (47.1%), and its total employees make up 45.6 per cent of all employees.

8.12 Male employees in the Catholic Education sector number 20,863 and female employees number 70,423. The sex of 8,084 employees was not recorded. It would be reasonable to expect that many employees in the Catholic Education sector are members of the LGBTIQ community and this is confirmed by word-of-mouth in the sector where there

³⁷ <https://www.ag.gov.au/RightsAndProtections/FOI/Documents/Part%205A%20-%20Exemptions%20-%20Part%201%20of%20-%20General%20Exemptions.pdf> (Accessed 11/01/2018)

Primrose Riordan, “New treason laws spark Church concerns” *The Australian* January 31, 2018. (Accessed 30/01/2018 <http://www.cathnews.com/cathnews/31198-new-treason-laws-spark-church-concerns>)

³⁸ <https://www.accer.asn.au/index.php/papers/148-our-work-matters-4mb/file> (Accessed 12/2/2018)

seems to exist an unwritten policy of “don’t ask, don’t tell” in respect of sexual identity and perhaps even – though this cannot be confirmed – sexual ‘lifestyle’; such a policy would call into question the legitimacy of any claimed ‘religious susceptibilities’.

8.13 The 2017 report *Our Work Matters* states that it was unable to determine the proportion of total employees who were ‘Catholic’, as a decision was made, for methodological reasons, not to collect data about individuals. The breakdown of full-time, part-time and casual employees by ‘sex’ was also not obtained, because of the way the survey was constructed. The report contains no data on the marital status of employees.

8.14 The *Our Work Matters* report does not contain any discussion or information regarding discrimination in employment practices by Catholic Church employers, nor any mention of exemptions from Commonwealth or State anti-discrimination legislation.

8.15 The Catholic Education Commission of Victoria (CECV) – and possibly other Catholic education authorities – has, in its *Statement of Principles Regarding Catholic Education*, a policy which states:

“All staff in the Catholic school have an indispensable role to play. It is expected of all staff employed in a Catholic school that [*inter alia*] they:

- (a) accept the Catholic educational philosophy of the school;
- (c) by their teaching and other work, and by personal example, strive to help students to understand, accept and appreciate Catholic teaching and values;
- (d) avoid, whether by word, action or public lifestyle, influence upon students that is contrary to the teaching and values of the Church community in whose name they act.³⁹

Though (a), (c) and (d) are referred to as ‘expectations’ by the CECV, it is not clear if and/or when these expectations might be translated to ‘requirements’ should a staff member of a Catholic school be found to have legally solemnised their marriage with a person of the same sex. It is also not clear when or how the Catholic education authorities might feel justified in terminating the staff member’s employment on account of their marriage, and by consequence, their ‘lifestyle’.

8.16 As mentioned in 8.12 above, there does seem to exist in the Catholic education sector an unwritten policy of “don’t ask, don’t tell” in respect of the marital situations of some employees which do not accord with Catholic teaching. Were Catholic education authorities prepared to overlook the situation of heterosexual Catholic teachers who had divorced and remarried, or Catholic teachers who were living in heterosexual *de facto* arrangements, and do nothing, but insisted on treating LGBTIQ Catholic teachers who had solemnised their same-sex marriage, in a different and discriminatory manner, such treatment by the same authorities could well be interpreted as a form of moral relativism. This issue is particularly important given the fact that Catholic schools receive the bulk of the funding from government sources.

8.17 With the recent changes to the *Marriage Act*, Catholics for Renewal has concerns for LGBTIQ persons who solemnize their marriages under the *Marriage Amendment Act 2017* and are currently employed in the Catholic Education sector or intend to seek employment in the sector. There is a particular concern that the married status of same-sex persons may be

³⁹<http://web.jpcvictoria.catholic.edu.au/jpcweb/files/Stories/users/HayesW/StatementofPrinciplesRegardingCatholicEducation.pdf> (Accessed 13/2/2108)

used against them in a discriminatory manner to either prevent them gaining employment in the Catholic Education sector or, if currently employed, to terminate their employment. Grounds for this concern may be found in some recent incidents in the United States of America, where female teachers in Catholic schools were dismissed from their employment after they had solemnised their same-sex marriages.⁴⁰ Catholics for Renewal is concerned that such discriminatory practices, based on the individual's marital status, could be an infringement of their human rights not warranted by the claimed arguments of religious freedom or 'religious susceptibilities'. Such discrimination would effectively reject the clear societal acceptance of marriage equality reflected in the recent official postal survey.

9. Freedom of religion and the seal of confession

9.1 The Catechism of the Catholic Church, reflecting the Church's canon law, states: "every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents' lives."⁴¹ This secret, which admits of no exceptions, is called the 'sacramental seal,' because what the penitent has made known to the priest remains 'sealed' by the sacrament."⁴²

9.2 The Royal Commission into Institutional Responses to Child Sexual Abuse has recommended to Australian Federal and State governments, that this Catholic 'seal of confession' should not exempt priests from a proposed civil offence of 'failure to report'. The Royal Commission presents in great detail and with much reasoned argument why it made this recommendation.

9.3 The Catholic Church continues to protest that there should be an exemption from the proposed civil offence of 'failure to report' to allow priest confessors to comply with its 'seal of confession', a church-made law. However, perpetrators of child sexual abuse are a grave danger to innocent children and the recommended requirement to report was based on extensive evidence of the past failures of institutional personnel to report, with the consequence of possible and probable further abuse of children by predators remaining at large.

9.4 The Royal Commission accepted that, in a civil society, it is fundamentally important to uphold the right of a person to freely practise their religion in accordance with their beliefs. But that right is not absolute. No society can allow religious institutions to demand exemption from laws made for the good of the whole society; all religious institutions should, without exception, be subject to the laws designed to protect and promote a good and safe society. As stated above, the State should not prevent its citizens from being able to freely practise their religion, but only as long as that practice does not unfairly prejudice the

⁴⁰ https://www.washingtonpost.com/news/education/wp/2018/02/11/not-the-right-kind-of-catholic-private-school-teacher-fired-days-after-same-sex-wedding/?utm_term=.c02431100870 (Accessed 13/2/2018)
<https://www.theguardian.com/us-news/2015/jul/09/pennsylvania-catholic-school-teacher-fired-same-sex-marriage> (Accessed 13/2/2018)
<https://www.americamagazine.org/politics-society/2018/02/13/firing-lgbt-catholic-church-workers-raises-hard-and-new-questions> (Accessed 14/2/2018)

⁴¹ *Code of Canon Law*, 1983, Canon. 1388.1

⁴² *Catechism of the Catholic Church*, *op. cit.*, n. 1467

rights of others. In this case, the acceptance of the seal of confession prejudices the rights and indeed the wellbeing of innocent children, who have a right to be protected by their government from sexual abuse. Article 34 of the *UN Convention on the Rights of the Child* states: “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”⁴³

9.5 The Royal Commission’s recommendation is necessary in the interests of the safety of all innocent children; it is clearly proper that any person with knowledge of a predator at large should bring that person to the attention of the police. Those same considerations warrant a change to the Catholic Church’s canon law to enable confessors to bring these predators to the attention of police in the interests of child safety; such a change is, of course, a matter for the Church, and should not constrain civil law. The inviolability of the seal of confession would continue to apply for other purposes, but civil law should not in this case provide an exemption for Catholic priest confessors to meet the requirements of Church-made law.

9.6 Catholics for Renewal does not see the Catholic Church’s law in this area as a matter of religious freedom justifying exemption from a carefully considered legislative provision applying to society generally. The protection of religious freedom in this case could involve the further abuse of innocent children by predators remaining at large in society despite knowledge of their existence by priests of the Catholic Church.

10. Conclusion

10.1 Catholics for Renewal has examined carefully the challenge faced by the Review Panel to “consider the intersections between the enjoyment of the freedom of religion and other human rights.” We submit that the principle underlying this brief is to protect the human rights of all while respecting to the extent reasonable the human right of freedom of religion, recognizing, however, that the interests of individual members of society should not be prejudiced by the views or practices of a particular religion if those religious views and practices are not generally supported by society.

10.2 Catholics for Renewal submits that the above principle is in accord with the essence of the most basic Christian teachings, as evidenced in this submission. Nevertheless, we are aware that some leaders of our own faith may seek some religious protections that do not accord with this principle. The views expressed in this submission have been shown to be based on the fundamental tenets of the Christian faith and generally accepted concepts of human rights.

11. Publication of Submissions

11.1 Catholics for Renewal requests that the Review Panel publish this submission of Catholics for Renewal and gives any necessary approval for that purpose. We are of the view that all written submissions to the Inquiry should be made public, unless confidentiality is specifically requested by the submission author and accompanied by persuasive reasons. Even in cases where confidentiality might be agreed, the essential elements of the submission should, in our view, be made public and the authors identified.

⁴³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Accessed 14.2.2018)

11.2. As the deliberations of the Review Panel will no doubt strongly influence any potential future legislative changes on the application of religious freedom, it is in the public interest that all the arguments put before the Review Panel on the matters under consideration, and which may influence the Panel's findings and recommendations, be in the public domain.

11.3 In a modern, free and democratic society, any appearance of secrecy or concealment around the inputs to the Freedom of Religion Review and its deliberations, or around the arguments which lead to its findings and recommendations, could be detrimental to the perception and reality of good governance. Further, it would be incongruous, not to mention prejudicial to its credibility, for a religious freedom inquiry to base its conclusions on submissions that have avoided public scrutiny.

Submission transmitted online to the Review Panel
14 February 2018